PRIVY COUNCIL REPORT

RE KONG THAI SAWMILL (MIRI) SDN. BHD.; KONG THAI SAWMILL (MIRI) SDN. BHD. & ORS. v. LING BENG SUNG

[Privy Council (Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Fraser of Tullybelton and Sir Garfield Barwick)
April 10-13, 17-19, 24 and June 22, 1978]
[Privy Council Appeal No. 25 of 1976]

Companies — Private company — Application to court for orders, on the ground that powers of directors are being exercised in a manner oppressive to one of the members or in disregard of his interests — Position of directors — Alleged misuse of company's funds — Companies Act, 1965, s. 181(1) & (2).

The respondent in this case had applied by originating summons in his capacity as a member of the first appellant company for a number of orders the gist of which was that the second and third appellants be removed from office as managing director and director respectively and a receiver and a manager be appointed to conduct the company's affairs and for repayment of various sums alleged to have been disposed of wrongfully or without proper authorization. There was an alternative relief asked for that the company be wound up. The company was a family one in which the elder brothers (the second and third appellants) were the majority shareholders. The respondent and two younger brothers were minority shareholders. It was alleged that the second and third appellants had committed breaches of their powers as directors of the company and in particular complaint was made relating to (a) the purchase and outfitting of a motor yacht, *Berjaya Malaysia;* (b) loan to Encik Harun Ariffin; (c) donations to political parties; (d) advances to and investments in joint ventures; (e) drawing by the second and third appellants from the company's funds and (f) remuneration paid to the second appellant as managing director. It appeared that after inquiries instituted by the respondent many of the acts of the second and third appellants were validated by resolutions of the Company. The learned trial judge dismissed the application but on appeal the Federal Court ([1976] 1 M.L.J. 59) held (a) that the purchase by the second appellant of the yacht, *Berjaya Malaysia* was misuse of the company's funds and the moneys which he had paid out or for which he had himself reimbursed from the company's funds in respect of the donations to political parties were improperly paid. The second appellant should therefore take over the *Berjaya Malaysia* and pay to the company all the money spent on it and also pay the company the amount of donations paid to the political parties; (b) that in order to protect the minority shareholders in this case the court would order (i) that one of the younger brothers be appointed a director to safeguard their interests; (ii) that donations be made in future only with the prior approval of the board of directors; (iii) that no bank account be operated without the signatures of two directors, one of whom shall be other than the elder brothers, the majority shareholders; (iv) that no moneys be drawn by any of the directors without the prior approval of the Board; (v) that the power delegated to the first respondent to make investments on behalf of the company be cancelled; (vi) that three clear days' notice be given in writing of any directors' meetings and (vii) that the bonus for the directors in future be 2% of the nett profits and that no bonus be paid until after the passing of the company's accounts at the Annual General Meeting. The appellants appealed.

Held, (1) the courts in applying section 181 of the Companies Act, 1965, should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions which were based upon a different section and in some cases restrictive. The same would apply, though with less force, to reliance upon Australian decisions based upon section 186 of the Australian Companies Act, 1951;

(2) relief could not be sought under section 181 of the Companies Act, 1965 merely because facts were established which would found a minority shareholders' action; the section required "oppression" or "disregard" to be shown and these were not necessary elements in a minority shareholders' action. But if a case of "oppression" or "disregard" were made out the section would apply and it was no answer to say that the relief might also have been obtained in a minority shareholders' action;

(3) for the case to be brought within section 181(1)(a) of the Companies Act, 1965 at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possessed a majority of the voting power and, in reliance upon that power, made policy or executive decisions, with which the complainant did not agree, was not enough. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out. Similarly "disregard" involved something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure;

(4) what was attacked by section 181(1)(a) of the Companies Act was not particular acts but the manner in which the affairs of the company was being conducted or the powers of the directors exercised. These might be held to be "oppressive" or "in disregard" even though a particular objectionable act might have been remedied;

(5) in this case none of the nine particular complaints listed by the Federal Court were substantiated and such relief as the Federal Court decided to give in respect of four of them could not be justified. There was no occasion to grant the ancillary relief under the remaining heads;

(6) the grant of winding up was in the discretion of the court. In exercising this discretion the court would have in mind the character of the remedy, if sought to be applied to a company which was a going concern; it would take into account *inter alia* the gravity of the case made out under section 181(1) of the Companies Act, 1965; the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; and the interests of other members of the company not involved in the proceedings. In this case the respondent had failed completely to make out a case for winding up the company;

(7) the remuneration of the directors and of the managing director which had been regularly voted and approved by the shareholders was a matter for them and no case could be made for interfering with that decision.

Cases referred to:-

(1) *In re H.R. Harmer Ltd.* [1959] 1 W.L.R. 62, 75.
(2) *Elder* v. *Elder & Watson Ltd.* 1952 S.C. 49.
(3) *Thompson* v. *Drysdale* 1925 S.C. 311, 315.
(4) *In re Jermyn Street Turkish Baths Ltd.* [1971] 1 W.L.R. 1042.
(5) *Re Bright Pine Mills Pty. Ltd.* [1969] V.R. 1002, 1011-2.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

P.J. Millett Q.C. (*Graham S. Hill, C.T. Wong* and *Elizabeth Gloster* with him) for the appellants.

John Vinellott Q.C. (*Peter Mooney, Robert Ham* and *Joseph Tang* with him) for the respondents.

Lord Wilberforce (delivering the judgment of the Board): This appeal and cross-appeal are against a judgment of the Federal Court of Malaysia (Appellate Jurisdiction) which allowed in part the respondent's appeal against the judgment of B.T.H. Lee J., in the High Court in Borneo. The proceedings were brought by the respondent ("Beng Sung") under section 181 of the Malaysian Companies Act, 1965, against the appellant company ("the Company" or "K.T.S.") and the individual appellants "Beng Siew" and "Beng Siong", seeking relief under that section.

The Company is a private company limited by shares which was incorporated on June 29, 1964 under the Sarawak Companies Ordinance, with the main purpose of extracting timber in Sarawak under licences

from the Government of Sarawak. Subsequently the Company has expanded its interests into other fields, and other geographical areas.

The authorised share capital of the Company is $3 million divided into 30,000 shares of $100 each; (references in this judgment are to Malaysian dollars). At the date of the issue of the Originating Motion, and thereafter, the issued and paid up share capital was $1,360,000 held as follows:

Names	*Number of Shares*	*Percentage*
Beng Siew	7,582	55.75%
Beng Tuang	1,060	7.79%
Beng Siong	1,060	7.79%
Beng Sung	330	2.43%
Beng Hui	330	2.43%
Beng King	340	2.05%
Others	2,898	21.31%

The first six of these named persons are brothers, being sons of Ling Chui Ming: there has been a separation of interest between the elder three and the younger three, and, at any rate as between Beng Sung on the one hand and Beng Siew and Beng Siong on the other, a degree of hostility and animosity. The above table shows

(i) that Beng Siew himself holds a majority of the issued shares;

(ii) that the interest held by the respondent Beng Sung is 330 shares representing 2.43%;

(iii) that there are shareholders representing approximately 34% who have taken no part in these proceedings.

It was claimed by Beng Sung that he was in some sense representative of himself and his two younger brothers — holding in the aggregate 7.36% — but there was no evidence that they supported his action. In any event, there are shareholders representing 21.31% outside the Ling family whose interests must be taken into account when considering what (if any) relief ought to be granted to Beng Sung. As regards the interest of Beng Sung himself, it is material that he acquired his shares in January 1967, i.e. after the Company had been formed by Beng Siew and Beng Siong and after Beng Siew had been granted or assumed management powers. Beng Siew was in fact elected Chairman and Managing Director on January 20, 1965 as from January 1, 1965 and has held these offices ever since. At all material times Beng Tuang and Beng Siong have been Directors. Beng Sung became a Director on February 2, 1967 and remained on the Board until February 16, 1971 when he retired and did not seek re-election. During this period he did not attend any Directors' meetings. At all material times there were Directors of the Company outside the Ling family, from three in 1965 to seven in 1969-1972.

The process leading to the present action started in April 1970 when Beng Sung, then a Director of the Company, wrote to the Company asking for details of donations made by the Company, and other matters, as revealed in the Company's accounts. He received no reply.

On September 29, 1970 he applied to the High Court in Borneo under section 167(5) of the Malaysian Companies Act, 1965, for an order that the accounting and other records of the Company be open to inspection by an approved company auditor. This application was not opposed by Beng Siew or Beng Siong and on November 18, 1970 Mr. Andrew Peattie, a Chartered Accountant, was appointed by the Court to inspect the Company's records on behalf of Beng Sung. Mr. Peattie made his inspection in June 1971 and produced a report. On the basis of this report Beng Sung on September 21, 1971 issued the Originating Motion herein. This Motion set out 60 heads of relief claimed by Beng Sung, and, at the end, alternatively asked that the Company be wound up. The procedure by Originating Motion is, their Lordships accept, in accordance with the law in Malaysia, but, since it is confined to stating the relief asked for, without setting out the case for such relief, or making any definite allegations in support, it may be embarrassing for those concerned to oppose it, and for the court. In fact, it became clear that the application was largely in the nature of a "fishing" expedition: such support as it has obtained is derived to a large extent from evidence obtained piecemeal, as the case proceeded, mainly from Beng Siew.

Before examining such heads of claim as have survived, their Lordships must refer to the relevant law.

Section 181(1) and (2) of the Malaysian Companies Act, 1965, are as follows: —

"(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the Order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up."

This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is

in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd.*[1]). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding-up of the company.

Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the "just and equitable" provision in the Act, but also that to wind-up the company would unfairly prejudice the "oppressed" minority. The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of "oppression" or "disregard", and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of section 210, but is not the case under section 181.

Their Lordships consider it important that courts applying section 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon section 186.

There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under section 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) "oppression" or "disregard" to be shown, and these are not necessary elements in the action referred to. But if a case of "oppression" or "disregard" is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder* v. *Elder & Watson Ltd.*[2]): their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson* v. *Drysdale*[3]). Neither "oppression" nor "disregard" need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Thirdly, in a number of United Kingdom decisions it has been held that for section 210 to apply the complainant must show oppression continuing up to the date of proceedings (e.g. *In re Jermyn Street Turkish Baths Ltd.*[4]); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a)) relates to a present state of affairs: "are being conducted", powers "are being exercised" are grammatically clear: the language may be contrasted with that of section 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-section (1)(a)) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty. Ltd.*[5]

Their Lordships have made these observations upon the Malaysian section 181, not because they disagree with the statement of the law by the Federal Court — which indeed recognised the wider scope of section 181 as compared with the corresponding provisions in England and in Australia. They are concerned rather to emphasise the utility of the jurisdiction conferred upon the courts in Malaysia, and to deal with particular arguments urged in this case with some of which they do not agree. It is now necessary to relate them to the facts as proved.

As their Lordships have already stated, the respondent first laid before the court 60 separate claims for relief concerning a large number of separate matters over a period of five years (1965 to 1970), some of them being the same complaint restated for separate years of account. Many of these were entirely trivial, if not frivolous; others lacked any evidential support. After extensive investigations by the trial judge, and findings of fact, there remained nine which the Federal

Court considered to be live issues. These were as follows: —

(1) Loan to Encik Harun Ariffin;
(2) Remuneration (Salary, Fees and Bonus) paid to Beng Siew;
(3) Travelling and Entertainment Expenses;
(4) Advances to and Investments in joint ventures;
(5) Investment in the Malaysia Daily News Sendirian Berhad;
(6) Purchase of the Aurora Hotel;
(7) Purchase and outfitting of the motor yacht Berjaya Malaysia;
(8) Donations to political parties;
(9) Drawings by Beng Siew and Beng Siong from the Company's funds.

Of these, items (3), (5) and (6) have disappeared from the case. As regards item (2), though no claim was put forward with regard to it in the Originating Motion, the Federal Court made an order reducing the bonus to which Beng Siew was entitled as Managing Director under a resolution of the Board from 4% to 1% of the Company's profits, and that of the Directors, or other Directors, from 2% to 1%. The respondent did not attempt to defend this order. The remuneration of the Directors and of the Managing Director, which had been regularly voted and approved by the shareholders, was a matter for them and no case was made for interfering with their decision. That leaves five complaints with which their Lordships must deal — numbers (1), (4), (7), (8) and (9).

Complaint No. (1) was stated by learned counsel for the respondent as a key matter. In itself it was almost trivial but it was said to have an important bearing upon the credibility or probity of Beng Siew and Beng Siong. It concerned a loan or loans made by the Company to one Harun Ariffin who was Federal Secretary in Sarawak. After an unsuccessful attempt had been made to show that these were corrupt payments, attention shifted to the question of the amount lent. The Company's accounts showed that Harun received from it $10,000 in March 1969 and a further $3,000 in October 1969. It also showed certain repayments made by Harun over a period. Harun admitted the receipt of the $10,000 but not of the $3,000. However, the Company produced what purported to be a receipt signed by him for $3,000. Then an attack was made on the authenticity of this receipt. But an eminent handwriting expert brought out from London expressed a strong opinion that it was genuine and the judge so found. As to whether Harun either received or repaid the sum of $3,000, the evidence was inconclusive. An account was sent to him by the Company on April 30, 1972 showing the two loans made to him — of $10,000 and $3,000 — upon which Harun sent a cheque for $12,925. On May 12, 1972 the Company wrote that on checking the account it had found the amount due to be $11,181.42 and enclosed a cheque for $1,743.58, the amount of the overpayment. In his letter of reply dated May 15, 1972 Harun did not deny receipt of the $3,000 but said that he was not aware of it and asked for clarification of the account. On May 18, 1972, by a letter which crossed that of Harun, the Company referred him to his receipt for $3,000 and asked if he had any doubts to let the Company know. He made no reply to this. He gave oral evidence at the trial that he did not receive the loan: in re-examination he denied having signed the receipt. As to repayment, the Company's account with him showed certain repayments having been made; the trial judge after examining these and making his own calculations found that the arithmetic was not consistent either with repayment of $10,000 with interest at 6½% or with repayment of $13,000 with interest but was rather more consistent with the latter than the former. He found that the loans had been repaid.

The Federal Court carefully re-examined the facts. They pointed out, justly, that the person who could probably have clarified the whole matter was Beng Siong, through whom the loan of $3,000 was said to have been made. But he, though present in court, was not called. In the end they came to no more definite conclusion than to express regret that this matter should have been raised and that there should have been such a fight about it. Nevertheless, they continued, if Harun's story about his never having received the $3,000 loan was true, and there was no evidence to contradict it, then it was "not possible to resist the conclusion that Harun's account with the company was not quite correct". Their Lordships do not disagree with this assessment; in their opinion the respondent's attempt to elevate this rather insubstantial and inconclusive matter into a key test of the individual appellants' honesty completely failed.

Complaint No. (7) can be briefly disposed of. In January 1968 Beng Siew purchased the hulk of a vessel for $48,000. It was then reconstructed as a yacht at a cost of $505,698. On June 20, 1969 the Directors of the Company resolved "to approve the purchase of a second-hand boat and to reconstruct it at a total cost of approximately half a million dollars". During the year 1969/70 the yacht was transferred into the name of the Company and $5,000 were spent on registration fees, etc. The running expenses of the yacht, charged to the Company, were $189,028 in 1968/69 and $95,910 in 1969/70. The yacht was shown in the Company's accounts as an asset of the Company and all expenditure on it was disclosed. The accounts were approved in General Meeting. Mr. Peattie, the investigating accountant, said that he had received a full explanation of the moneys spent on the yacht.

These transactions may be criticised. The belief that possession of a yacht and the use of it for entertainment promotes the Company's interests may fail to convince: the originally intended use of the yacht — for visiting Niah, a place inaccessible by ordinary means — did not materialise: the use of it by Directors, particularly by Beng Siew and Beng Siong personally, might not appeal to shareholders. But these were all matters for decision by the members of the Company, and if they chose to approve expenditure of doubtful value and even a degree of extravagance that was their choice. Neither Beng Sung nor other Directors or shareholders complained at the time. The trial judge took the view that this expenditure was authorised by the Directors and, impliedly, that it was a matter for

their discretion. The Federal Court took the opposite view. They ordered Beng Siew to repay all money spent on the yacht with interest, upon which being done the Company should transfer it to him. Their Lordships consider that on this matter the decision of the trial judge was correct and that the order of the Federal Court ought not to have been made.

Complaint No. (8). This relates to considerable sums paid out of the Company's funds as donations to political parties and to other causes, in the year 1968/69, at which time elections were due to be held in Malaysia. At the trial attention was focused only upon the political donations. These donations were reported upon by Mr. Peattie: in his oral cross-examination he said that "as far as I know there is not a jot of evidence to suggest anything improper" adding, significantly, that he had been looking for impropriety. The Company's accounts for 1968/69 showed donations as having been made to the following: — Sarawak Chinese Association (S.C.A.) ... $1,009,800.69 Sarawak National Party (S.N.A.P.) ... $145,000.00 The Company by its Memorandum of Association had power to make donations. None of those mentioned were specifically authorised by the Directors before being made, but they appeared as a bloc figure in the Company's audited accounts for the year ended September 30, 1969 with a note by the auditors that they "were mostly through the Managing Director". These accounts were approved at the Company's annual general meeting on March 9, 1970. In addition — after the respondent had started to make his complaints — they were retrospectively approved by reference to a list at a Board meeting held on June 10, 1970. Beng Siew, when he came to give evidence, was pressed to justify these donations. In his first appearance in the witness box, in April 1972, he gave general evidence as to the purposes for which they were made, and he was then asked to obtain and produce documents vouching individual payments. In his second appearance in November 1972 he produced a large number of receipts and equivalent documents and he gave oral evidence as to the destination, i.e. the political destination, of payments which he had made. This evidence was not challenged. Their Lordships had the benefit of a detailed analysis, based on the documents produced and on the oral evidence of Beng Siew, as to the manner and extent to which he was able to account for the payments made by the Company itself, or of payments made by Beng Siew in the first place for which he was reimbursed by the Company. This showed that he was able to account for and adequately document all but $248,800.69 out of $1,009,880.69 of the donations made to the Sarawak Chinese Association. He also produced receipts for $145,000 paid to the Sarawak National Party, or to dissident members of that party who might support the Alliance. As regards the $248,800.69, the allegation made by the respondent was one of "misappropriation" by Beng Siew — which at the trial was explained to mean that these moneys might have found their way into the pocket of Beng Siew for his personal benefit. The learned trial judge found however that this allegation was unsubstantiated, and that the allegations that the political donations (viz. all of the donations) were made for personal political advancement of Beng Siew had not been proved. Before the Board the allegation of "misappropriation", though persisted in, was explained to mean failing to account for money taken from the Company. The learned trial judge, after referring to Mr. Peattie's evidence about the donations (see above) made these other findings of fact —

(a) that donations were in fact made by Kong Thai (i.e. the Company), not by Beng Siew, in the amounts and to the recipients disclosed in his evidence;

(b) that the Company had power in its memorandum to make donations;

(c) that all the donations were reported at board meetings and approved by the Directors and that the accounts were audited;

(d) that the accounts containing reference to the donations were presented at the annual general meetings of the shareholders of the Company and approved by the members without dissent.

These findings were criticised on the ground that (a) was indefinite, that as regards (b) no prior authorisation of donations was made, that they were only approved retrospectively on June 10, 1970, after the respondent had made his complaint, that as regards (c) they were only approved by the shareholders at an annual general meeting in a bloc figure.

Their Lordships are not impressed by these criticisms. There were two relevant issues only before the court, namely:

(1) whether the political donations were made *bona fide* in the belief that they were in the interests of the Company, and

(2) whether Beng Siew had "misappropriated" any of them.

The respondent's challenge mainly focused upon (2). The trial judge heard the evidence of Beng Siew and was moreover able to appraise it in the language in which it was given (Foochow). He clearly accepted Beng Siew as a truthful witness: he strongly rejected any charge of misappropriation. Mr. Peattie, as stated above, found no evidence of impropriety. As regards the interests of the Company, it was open to the Directors to take the view that, dependent as the Company was upon government licences or concessions, it would be money well spent to promote the return of the government party and of certain candidates opposed to S.N.A.P. The learned judge cannot have failed to appreciate the difficulty in which Beng Siew would find himself, in some cases, if he were pressed to give names of some recipients — indeed that he did so is clear from a passage at the close of his judgment.

On the whole of this matter, the findings of the trial judge are entirely in favour of Beng Siew and against the respondent's contentions. The Federal Court re-examined the whole of this matter. They referred to the "very unsatisfactory nature of Beng Siew's evidence", found that Beng Siew had no authority to make the donations, and concluded that neither the Board nor the Company in general meeting could give him authority to reimburse himself moneys which he had spent for political purposes — they ordered

Beng Siew to repay the Company the whole of the money — not only the amount for which he could not produce documentary evidence — paid out in 1968/69.

Their Lordships cannot with respect agree with this part of the Federal Court's judgment. The reference to Beng Siew's evidence cannot stand with the findings of the judge on the question of pure fact after hearing the evidence. And if it was true that Beng Siew lacked prior authority for some or indeed most of the donations made, this, if a matter within the Company's power, could be, (as it was) validated by the Board and the Company in general meeting. Their Lordships do not need in this appeal to enter upon the wider question whether, in what circumstances, and on what scale, it may be proper for a company to make, out of shareholders' funds, donations for political purposes. They have not the material upon which to pronounce any judgment, and to do so would not bear upon the issue whether, in making the donations, Beng Siew was guilty of lack of probity or oppression. On these matters the trial judge pronounced in his favour and, in their Lordships' opinion, his decision should not have been reversed. Their Lordships cannot therefore uphold the Federal Court's order on Beng Siew to repay the amount of the donations.

Complaint No. (9) relates to drawings made by Beng Siew and Beng Siong by way of loans from the Company. These were

(a) considerable in amount,

(b) unauthorised by the Board at the time,

(c) in contravention of the Companies Act, being loans to directors of a non-exempt private company,

(d) unsecured,

(e) made at a time when the Company was undercapitalised,

(f) without a charge being made for interest.

As regards the latter, when the Directors, on June 10, 1970, came to pass a number of resolutions approving or validating actions by Beng Siew, interest was charged at 7%, and paid retrospectively on all loans made. The learned judge in his judgment said that the failure to charge interest prior to the commencement of proceedings was not deliberate. In their Lordships' opinion the Federal Court was justified in regarding these matters as very serious. They went on however to disagree with the trial judge's finding that failure to charge interest was due to inadvertence and held that the loans were concealed from the other Directors and the shareholders. The facts as regards Beng Siew's drawings were that he made repayments from time to time — sometimes by way of crediting the bonus to which he was entitled — and cleared off any balance at the end of each year. It was not put to him when he gave evidence that this was done in order to conceal the loans from the Directors. Moreover, in most of the year 1969/70 the account with the Company maintained by Beng Siew (in the name of Ling Beng Siew & Co.) was in credit.

As regards Beng Siong, he received loans in smaller amounts. Moreover, though he cleared the amount outstanding at the end of the year, in 1969 he immediately re-drew an equivalent sum. The appellants now by their counsel accept that the drawings were improper and that no further loans should be made to them. All these loans have been repaid, and interest at 7% debited to the recipients: (the relief sought was interest at 8% but the Federal Court in other matters fixed 6% as appropriate). There is therefore no particular relief which need, or can, be given in respect of them. The transactions however remain material as evidence of "oppression" or "disregard".

Complaint No. (4). Advances to and investments in joint ventures. This item relates to certain trading interests of the Company and Beng Siew in Indonesia, Malaysia and Hong Kong. There were a number of allegations made by the respondent as to Beng Siew's conduct of these operations, of the nature of price-rigging, to the prejudice of the Company, of breach of fiduciary duty, of failure to disclose an interest. In the end, after a lengthy, but necessarily incomplete, investigation into the affairs of these companies, the respondent was not in a position to claim any specific relief, but he relied strongly upon Beng Siew's conduct in these matters to support his claim for a winding-up of the company. His basic contention was that there were a number of matters to be investigated and that this could only, or best, be done by a liquidator of the Company. Their Lordships have seen and considered accounts of these companies and certain relevant contracts. Having examined these and considered the contentions upon them of Beng Sung, as well as the evidence of Beng Siew, they can, without entering into excessive detail, state the following conclusions:

(A) *P.T. Kalimantan Sari and United Singapore Lumber (Pte.) Ltd.*

P.T. Kalimantan Sari was an Indonesian company and timber concessionaire. The Company (K.T.S.) held 48% of its share capital and 7% was held by Beng Siew. All its timber was sold to United Singapore Lumber (Pte.) Ltd., a Singapore company, which then resold it. That company had at first only two shareholders — being the subscribers to the Memorandum — one of whom was Beng Siew, the other a Mr. Gould on behalf of the Borneo Company, one of the Inchcape Group of Companies. Initially it obtained its finance by way of loans from the Company (K.T.S.). The respondent alleged that the prices paid by United Singapore Lumber (Pte.) Ltd. to P.T. Kalimantan Sari were "rigged" so that the latter (in which the company — K.T.S. — was interested) made losses whereas the former (in which Beng Siew was interested) made profits. The learned judge held that there was no evidence to support this. Beng Siew moreover maintained, and gave evidence, that he had throughout held his share in United Singapore Lumber (Pte.) Ltd. as trustee for the Company — K.T.S. He received no dividends on this share. Later United Singapore Lumber (Pte.) Ltd. issued additional shares, bringing the issued capital up to 200,000 shares. The Company received 96,000 (48%), Beng Siew 8,290. During the resumed hearing in November 1972 Beng Siew produced trust deeds, executed in November 1972, show-

ing that he held these shares in trust for senior staff in the Company. It was said that these documents were executed under the pressure of the trial — there may be truth in this. But Beng Siew gave evidence that his original one share was throughout held for Company, as the share of Mr. Gould was for the Borneo Company, and in fact he derived no benefit from his holding in United Singapore Lumber (Pte.) Ltd. He received remuneration as director but there was nothing improper in that. The Federal Court said no more in these matters than that they vindicated the respondent's complaint and showed that he was not actuated by malice.

(B) *The Hong Kong and Malaysian Companies*

These matters are more complicated. There were two Hong Kong companies — Chalfont Investments Ltd. and Glendale Investments Ltd. These were formed in 1968 by Beng Siew, persons acting for the Inchcape Group and others — Kong Thai Sawmill not being concerned. Each was associated with a Malaysian company — Chalfont with Kong Thai Lumber Sdn. Berhad ("K.T. Lumber"), Glendale with Sabah Agency Sdn. Berhad ("Sabah"). The Company (K.T.S.) had a substantial interest in Sabah and K.T. Lumber: it had no interest in either Hong Kong company. On the other hand, Beng Siew, and also Beng Siong, had holdings (35% to 37.5%) in each Hong Kong company, and Beng Siew had also, but lesser holdings, in both Sabah and K.T. Lumber. The Malaysian companies were timber extracting companies and sold timber to the Hong Kong companies which resold.

The attack on these matters was similar to that in relation to P.T. Kalimantan Sari (above). It was said that the contracts were unfavourable for the extracting companies, so that Beng Siew was making, indirectly, profits at the expense of the Company (Kong Thai Sawmill). But the figures did not support this. Those set out in the respondent's case were — their Lordships accept by inadvertence — quite erroneous, and the true figures did not bear out the allegations. It was further said that the original contracts between the Hong Kong companies and the Malaysian companies had been amended (in the interest of the latter) during the proceedings — but the evidence does not bear this out. The whole case set up by the respondent under this heading was inherently improbable, since Beng Siew himself had a substantial interest in the Malaysian companies; and moreover Mr. Gould, the representative of the Inchcape Group, and a person of considerable standing, was directly associated with Beng Siew in making the contractual arrangements between the two groups of companies — a fact which makes an attack on the latter implausible.

Another head of complaint was that Beng Siew ought to have disclosed, but did not disclose, his interests in the Hong Kong companies to the Board of Kong Thai Sawmill. The evidence as to this was incomplete — there was certainly no evidence of any deliberate concealment, and the basis of any liability to disclose was not clear in law. In any event such failure as there may have been lies outside the scope of section 181.

It was said, finally, under this heading that Beng Siew ought to account to the Company (K.T.S.) for such profits as he may have made through the Hong Kong companies. The Federal Court held that he was not so liable and again a claim of this nature falls completely outside these proceedings.

Their Lordships are therefore of the opinion that none of the nine particular complaints listed by the Federal Court were substantiated and that such relief as the Federal Court decided to give in respect of complaints (2), (7), (8) and (9) cannot be justified (viz. under headings (a), (b), (i) and (j) of its order). Their Lordships also consider that there was no occasion to grant the ancillary relief under the remaining heads.

There remains the claim for the winding-up of the Company, put forward as an alternative in the Originating Motion, and the subject of the respondent's cross appeal. This claim though pressed in both courts below was rejected by both of them.

Winding-up is specifically mentioned in section 181(2)(e) of the Companies Act as a head of relief which the court may grant. No limiting conditions are imposed, so that the granting of it is in the discretion of the court. In exercising this discretion, the court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under section 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.

The examination which has already been made shows, in their Lordships' opinion, that with the possible exception of the matter of drawings the respondent has failed to make out any case of oppression or of disregard of these interests. In the end, the respondent's case was based on alleged lack of probity on the part of Beng Siew — hence the heavy reliance placed on the payments to Harun, and on the alleged need for an investigation into the joint ventures. Neither of these matters justified the weight placed upon them, and without them the matter of the drawings, though a matter for serious criticism, is not in their Lordships' judgment of such a character as to justify winding-up. As regards the respondent himself, though he was in a position by virtue of his position as Director from 1967 to 1971 to inform himself of the manner in which Beng Siew, as Managing Director, was conducting the Company's affairs, he took no steps to do so. Though a shareholder since 1967 he took no steps to complain of the matters shown in the accounts until, after seeing the draft accounts for 1969, he complained of the amount of the donations. His interest in the Company is limited to 2.43%: he has received from the Company sums amounting to over 250% of the nominal value of his shares over four years: there are shareholders outside the Ling family, holding over 20%, who have not come forward to support his claim for winding-up. Further than this, at a Board meeting held on March 31, 1972 at which were present five independent shareholders who could claim to speak for over 1,000 shares, resolutions were passed affirming confidence in Beng Siew and

strongly opposing the winding-up of the Company as "it would cause irreparable damage". If the respondent were entitled to any remedy, the case might call for an offer to purchase his shares: such an offer (at 600% of their par value) has been made. This he is entitled to reject, but rejection does not strengthen his claim to put an end to the Company. Finally it was said that, as the Company's concession had only a short time to run before it expired, and as the Company had few other assets, this was not in reality a case of destroying a going enterprise. The Company had no prospect of continuing life and what was sought was merely independent control of an inevitable liquidation. But it does not follow, and should not be assumed, that the Company had no other profitable activities open to it, and it would be for the shareholders as a whole to decide whether the Company should continue, after the concession expired, or should be terminated.

In their Lordships' opinion, the respondent failed completely to make out a case for winding this Company up, and the cross-appeal must fail.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be allowed and the judgment of the trial judge restored and that the cross-appeal be dismissed. The respondent must pay the costs before the Board and in the courts below.

Appeal allowed;
Cross-appeal dismissed.

Solicitors: *Coward Chance; Stephenson Harwood.*

SINGAPORE REPORTS

SINGAPORE TRANSPORT SUPPLY SERVICE PTE. LTD. v. WEE PENG WHATT & ORS. PUBLIC CRANE CO. v. WEE PENG WHATT

[C.A. (Wee Chong Jin C.J., Kulasekaram and D'Cotta JJ.) April 18, 1978]

[Singapore — Civil Appeals Nos. 43 and 46 of 1977]

Labour Law — Employment — Negligence — Employer to use reasonable skill and care to provide a safe and proper system of work — Appeal — Dispute as to liability.

Torts — Negligence — General duty of care — Master-servant relationship — Common law duty to take reasonable care for safety of servant.

These appeals arose out of a High Court decision (see [1978] 1 M.L.J. 192) which found the appellants, Singapore Transport Supply Service Pte. Ltd. (hereinafter called *S.T.*) and Public Crane Co. (hereinafter called *P.C.*) equally liable for the accident caused to the respondent, *W.* and awarded damages against them. Briefly, the facts as found by the court were as follows:— *W.* was employed by *S.T.* as a labourer to unload goods from their lorries on the quayside into the holds of tongkangs. *S.T.* hired the cranes from *P.C.* The crane belonged to one *L.*, the third respondent. On the day of the accident, *W.* was in the tongkang carrying out his duties in the unloading when the crane driver in the course of lowering cartons of milk stacked on a pallet into the tongkang lowered it on the person of *W.* thus causing injuries to him. The court found that the accident was caused by the negligence of the crane driver and/or the crane attendant, both employees of *P.C.* *S.T.* was also found liable in failing in their duty to *W.* as his employers to take reasonable care for his safety as their servant as they did not provide and maintain a safe system of work. *S.T.* and *P.C.* appealed.

Held, dismissing both appeals: (1) an employer was under a duty to take reasonable care for the safety of his workmen. Where the task was such as to call for the laying down of a system or mode of working in the interests of safety it was the employer's duty to use reasonable skill and care to provide a proper and safe system of work. The test was what was reasonable and proper to be done for the safety of the workman in the circumstances of the particular case;

(2) the crane attendant was bound to carry out his duties at the material date "according to the orders and under the absolute control of" *P.C.* The latter was therefore vicariously liable for the negligence of the crane attendant which resulted in the injuries sustained by *W.*

Cases referred to:-

(1) *Winter* v. *Cardiff R.D.C.* [1950] 1 All E.R. 819, 823.

(2) *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ltd.* [1893] 1 Q.B. 629, 631.

COURT OF APPEAL.

Tan Tee Seng for the appellant (Singapore Transport Supply Service Pte. Ltd.).

Datuk David Marshall for the appellant (Public Crane Co.).

H.E. Cashin for the respondent.

T.L. Lee for the third respondent.

Wee Chong Jin C.J. (delivering the judgment of the Court): These two appeals arise out of a High Court action in Suit No. 932 of 1975 commenced by Wee Peng Whatt, the first respondent in Civil Appeal No. 43 of 1977 and the respondent in Civil Appeal No. 46 of 1977, against Singapore Transport Supply Service Pte. Ltd., the appellant in Civil Appeal No. 43 of 1977, Public Crane Company, the second respondent in Civil Appeal No. 43 of 1977 and the appellant in Civil Appeal No. 46 of 1977, and Lim Ah Soon.